

The claimant raises the following issues on review: (1) whether the claimant suffered personal injury by accident arising out of and in the course of employment with the respondent; (2) whether surgery performed on claimant's upper extremities was effective or ineffective causing continued complaints; and, (3) whether medical testing and treatment should be authorized to ascertain the extent, if any, of repair to the injury at respondent, as opposed to whether there was an aggravation at a subsequent employer.

The respondent raises on review the issue of whether the claimant's current complaints, symptoms and need for medical treatment are a natural and probable consequence of her original injury or the result of an aggravation working for a subsequent employer or due to her current job duties with a subsequent employer. Respondent further contends claimant's issue of whether the bilateral carpal tunnel surgery was effective is not a jurisdictional issue subject to review on appeal from a preliminary award.

FINDINGS OF FACT

Having reviewed the record filed herein, the Board makes the following findings of fact and conclusions of law:

1. The claimant began having bilateral wrist symptoms January 10, 2000 while performing her job duties for the respondent. Her work at that time required her to repetitively use power sprayers and drills. The claimant's uncontradicted testimony establishes she suffered accidental injury arising out of and in the course of her employment with respondent.

2. The respondent provided treatment with the company physician who referred the claimant to Richard B. Baker, M. D. Dr. Baker ultimately performed bilateral carpal tunnel surgery. The right carpal tunnel surgery was performed April 10, 2000, and the left carpal tunnel surgery was performed the following month.

3. After her surgeries, the claimant returned to work for respondent and was provided either light duty or accommodated positions within the restrictions provided by Dr. Baker. Although claimant testified she had no problems while performing the light duty or the accommodated position work, she further testified that after her carpal tunnel surgeries the numbness and pain gradually returned to both hands and would awaken her during the night with tingling and pain.

4. In October 2000, the claimant left work for a surgical procedure unrelated to this claim. On November 22, 2000, Dr. Baker released claimant from further treatment for her carpal tunnel condition and provided a permanent partial impairment rating.

5. The respondent had a company-wide layoff and on December 1, 2000, claimant received notification that she had been laid off. The claimant had not returned to work for respondent after she had the surgery in October 2000, which was not work-related.

6. The claimant was unemployed from December 2000 until April 2001 when she obtained employment with Concept Foods, a meat processing plant. The claimant worked on a line requiring repetitive hand activities. After four hours of work claimant's hand pain required her to move to a different position. However, by the end of the workday,

claimant's hand pain had worsened to the point that she did not return to work for that employer.

7. The claimant had not sought additional medical treatment for her hands after being released by Dr. Baker until after her attempt to work for Concept Foods. The claimant was examined on July 12, 2001, by William O. Reed, Jr., M.D. and was examined on August 25, 2001, by L. V. Borgendale, M.D. Both doctors diagnosed persistent carpal tunnel symptoms and recommended additional testing and treatment.

8. The claimant began working part-time from 3 to 5 hours a day for Rambler's Catering in August 2001. The claimant works in the catering kitchen where she lifts large, bulky and very heavy pans. The claimant noted that such work has worsened her hand pain.

9. The claimant testified that before working at Concept Foods she could still perform everyday activities. But after working at Concept Foods her hands were in constant pain for days with swelling in both hands.

CONCLUSIONS OF LAW

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment is due to the work-related accident or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of her prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.³ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

¹K.S.A. 44-551(b)(2)(A).

²K.S.A. 44-534a(a)(2).

³Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

by an independent intervening cause.⁴ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

Dr. Baker's record dated September 5, 2000, contains the comment that claimant's recent nerve conduction studies were interpreted as normal. In November, Dr. Baker released claimant from treatment. Although the claimant testified that numbness and pain had gradually returned to her hands after her bilateral carpal tunnel surgery, she never sought additional medical treatment for her hands until after she attempted work for a subsequent employer.

The claimant testified that before she attempted work with Concept Foods she was able to perform everyday activities. After her attempt to work at Concept Foods the claimant noted her hands were in constant pain for days with swelling in both hands. Her condition had clearly worsened and as a result she sought additional medical treatment. Moreover, the claimant testified her current employment has worsened the condition of her hands.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's testimony establishes her condition has worsened as a result of her subsequent employment activities. The present need for medical treatment is the result of her worsened condition caused by her subsequent and continuing work activities. Accordingly, the present need for medical treatment is not causally related to claimant's former employment with respondent. Based on the record compiled to date, the Administrative Law Judge's denial of medical benefits is affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁵

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated November 15, 2001, is affirmed.

⁴Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

⁵K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of February 2002.

BOARD MEMBER

c: Thomas Odell Rost, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director